UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

ORDER

Pending before the Court is an oral request by a group of non-party media entities for access to attend a sealed portion of the proceedings in the above-captioned case. In conjunction with a hearing being held on the appropriate remedy for antitrust violations found by the District Court in this case and affirmed by the Court of Appeals, the Court determined, by consent of the parties and in the absence of any objection, that portions of the testimony could appropriately be heard under seal in order to preserve the confidential business information of non-party Novell, Inc. Thereafter, counsel for the media entities raised the issue of whether such closure was appropriate.

Following the media's motion, a colloquy on the issue was held both in open court and in a bench conference, the transcript of which is incorporated herein by reference. To summarize, during his cross-examination of Dr. Carl Ledbetter, a witness proffered by the Plaintiff Litigating States, counsel for Defendant Microsoft plans to ask questions regarding a confidential business meeting between Defendant Microsoft and Novell. The witness's responses to these questions are likely to reveal Novell's confidential business information. The parties and Novell agreed

that the relevant portion of the cross-examination should be conducted under seal and that the exhibit(s) attendant thereto should be maintained in the record under seal. During a sealed colloquy between counsel for the parties and Novell and the Court, counsel for Microsoft made a proffer of the likely testimony to be elicited in conjunction with Defendant's Exhibit 1088, a document which reflects four subjects discussed during the confidential business meeting. Likewise, counsel for Novell made a proffer as to the nature of the business interest held by Novell. Following this colloquy, counsel for Novell and Microsoft agreed that, for the most part, subjects one, two, and three, would be appropriate for discussion in open court. Counsel for Microsoft and Novell further agreed that questioning regarding primarily the fourth subject and, to a limited extent, the other subjects inasmuch as they relate to or are interwoven with the fourth subject, should properly be elicited under seal. This position was presented to the Court in a brief, unsealed session at the end of the day.

Case law from the D.C. Circuit acknowledges that, in general, "[t]he first amendment guarantees the press and the public a general right of access to Court proceedings." *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). However, this right of access is far from absolute, as courts have recognized numerous exceptions to the general rule of openness. *See Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978) (listing various exceptions). Although much of the available case law on the subject of openness arises in the criminal context, the "presumption of openness" applies in the civil context as well. *See Johnson v. Greater Southeast Community Hosp. Ctr.*, 951 F.2d 1267, 1277 (D.C. Cir. 1991). This presumption may be overcome "by an overriding interest based on findings that disclosure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984). Protecting an entity's

"competitive standing" through retained confidentiality in business information has been recognized as an appropriate justification for the restriction of public or press access. *Nixon*, 935 F.2d at 287.

The D.C. Circuit has elaborated that a court contemplating restricting access to court documents should consider the following six factors:

> (1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

See United States v. Hubbard, 650 F.2d 293, 317-22 (D.C. Cir. 1980). Applying these factors, the Court finds that there is no particular need for public access to the document at issue and testimony relating to that document, aside from the more generalized public interest in these judicial proceedings. The Court notes that the document at issue (like the discussion relating to it) was created and maintained pursuant to a confidentiality agreement which continues to bind the parties. Novell, a third party, has clearly objected to disclosure of this information in open court and has displayed strong property and privacy interests in maintaining the confidentiality of the information at issue. As noted above, the relevant document and testimony will be introduced as part of Microsoft's cross-examination of Dr. Ledbetter.

Having reviewed Defendant's Exhibit 1088 and, in light of Microsoft's proffered testimony and Novell's proffered business interest in maintaining confidentiality, the Court finds that the release of certain information contained in and relating to Defendant's Exhibit 1088 would result in "clearly defined and very serious injury" to Novell's business interest.[1] *United*

[1]The Court notes, for the benefit of the Court of Appeals, that the most pertinent information to this finding was conveyed during the sealed bench conference on March 27, 2002.

States v. Exxon Corp., 94 F.R.D. 250, 251 (D.D.C. 1981) (quoting *United States v. International Business Machines, Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)). As a result, the Court concludes that the limited inquiry as described above should be conducted under seal, in a closed courtroom. In this regard, the Court notes that the closure of the courtroom and the sealing of documents and testimony is narrowly tailored to include only the specific information which, if released, would be detrimental to Novell's business interest. *See Press-Enterprise*, 464 U.S. at 510. This information has heretofore remained confidential and would not become public but for its use in these proceedings. Other portions of the cross-examination relating to Defendant's Exhibit 1088 will be held in open court and on the public record, as will all other appropriate portions of evidence in this proceeding.

Accordingly, it is this 28th day of March, 2002, hereby

ORDERED that the above-specified portions of proceedings in this case shall be conducted under seal.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge